152 US 625

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RECORD, CASE No. 14,331.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 291.

WILLIAM B. BOGLE, RULUF LYLES, ALEXANDER SCOTT, AND WILLIAM Y. BOGLE, PLAINTIFFS IN ERROR,

vs.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1890.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William D. Bogle, Ruluf Lyles, Alexander Scott, and William Y. Bogle, plaintiffs, and Daniel Magone, defendant, a manifest error hath happened, to the great damage of the said William B. Boyle, Ruluf Lyles, Alexander Scott, and William Y. Bogle, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 31 day of March, in the year of our Lord one thousand eight hundred and ninety.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 903. N. S., 12412. U. S. Supreme Court. Wm. B. Bogle *et al.*, plaintiffs in error, against Daniel Magone, defendant in error. Writ of error. Comstock & Brown, attorneys for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 1 day of April, 1890. Edward Mitchell, attorney for defendant in error. U. S. circuit court. Filed Apr. 1, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto do hereby certify that the following pages, numbered from 3 to 32, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William B. Bogle, Ruluf Lyles, Alexander Scott, and William Y. Bogle, plain-

tiffs in error, against Daniel Magone, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

WILLIAM B. BOGLE, RULUF LYLES, ALEXANDER SCOTT, and WILLIAM Y. BOGLE, Plaintiffs, *against* DANIEL MAGONE, Collector of the Port of New York, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated May 23, 1888.

COMSTOCK & BROWN,
Plaintiffs' Attorneys.

Office and post-office address: No. 44 Broadway (room 55), New York city.

4 [Endorsed:] N. S., 12412. Superior court of the city of New York. William B. Bogle *et als. vs.* Daniel Magone, collector, &c. Copy summons. Comstock & Brown, plaintiffs' attorneys, 44 Broadway, New York. Personally served May 23, 1888. Custom-house, New York. Received May 25, 1888. U. S. attorney's office.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

[L. S.] We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Daniel Magone, defendant, by William B. Bogle *et al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 9 day of June, 1888, as fully and amply as the same are remain-

ing before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 2 day of June, in the year one thousand eight hundred and ninety.

JOHN A. SHIELDS, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] 12412. U. S. circuit court. William B. Bogle *et al. vs.* Daniel Magone. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, June 2, 1888. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. & B., plaintiffs' attorney-. Due service of a copy of the within and of the above notice is hereby admitted. New York, June 2, 1888. Comstock & Brown, plaintiffs' attorney-.

7 United States Circuit Court for the Southern District of New York.

WILLIAM B. BOGLE, RULUF LYLES, ALEXANDER SCOTT, and WILLIAM Y. BOGLE, Plaintiffs,
against
DANIEL MAGONE, Collector of the Port of New York, Defendant.
} Complaint.

Plaintiffs complain—

1. That defendant was during the times hereinafter mentioned collector of customs of the United States at the port of New York.

2. That the plaintiffs were during such times partners in trade, doing business in the city of New York and elsewhere, under the firm name of Bogle & Lyles, and as such duly imported and entered at the port of New York the goods described in the bill of particulars.

3. That the plaintiffs, in order to obtain said goods, were compelled to pay the defendant as such collector the sum of sixty dollars in excess of the lawful rate of duty on said goods and of the amount required by law.

4. That plaintiffs filed with said defendant due and timely protest in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

8 5. That plaintiffs made due and timely appeal on each entry to the Secretary of the Treasury, whose decision on each appeal has been either rendered within ninety days previous to the commencement of this action or delayed more than ninety days subsequent to the date of lodging such appeal.

6. That the bill of particulars hereto annexed states for each importation, separately, the date of entry at the custom-house, of payment of duty in excess, of the filing of said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered, together with other particulars required by law, and is made a part hereof.

7. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum so exacted as aforesaid, with interest on the several sums named in the bill of particulars from the respective dates of payment as appear thereby, together with the costs and disbursements of this action.

COMSTOCK & BROWN,
Plaintiffs' Attorneys, 44 *Broadway, New York.*

9 Endorsed: No. 12412. United States circuit court, southern district of New York. William B. Bogle *et al.*, plaintiffs, *vs.* Daniel Magone, as collector of the port of New York, defendant. Copy complaint and bill of particulars. Comstock & Brown, plaintiffs' attorneys, 44 Broadway, New York. To Stephen A. Walker, Esq., U. S. att'y, att'y for def't. U. S. attorney's office. Received June 25, 1888.

Bill of Particulars.

Name of importers, Bogle & Lyle.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty exacted in excess.	Date of payment of duty in excess.	Protest filed.	Appeal filed.	Date of Secretary's decision.
Fish pastes....	London.....	Lydian Monarch...	Oct. 27, '86	Nov. 16, '86	$15	Nov. 16, '86 Ap'l 8, '87	Ap'l 8, '87	Ap'l 8, '87	None.
		Egyptian Monarch.	Nov. 29, "	Dec. 22, "	15	Dec. 22, '86 Ap'l 8, '87	" 8, "	" 8, "	"
		Richmond Hill.....	Ap'l 5, '87	Ap'l 27, '87	15	" 27, "	Sep. 29, "	Sep. 29, "	M'ch 16, '88
		Ludgate Hill.....	June 28, "	July 20, "	15	July 20, " Dec. 16, "	Dec. 16, "	Dec. 16, "	" 16, "
					$60 00				

11 Circuit Court of the United States for the Southern District of New York.

WILLIAM B. BOGLE *et al.*
versus
DANIEL MAGONE, Collector, etc. } N. S., 12412.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint, was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon; or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 [Endorsed:] 12412. U. S. circuit court, southern district of New York. W. B. Bogle *et al. vs.* Daniel Magone, collector, etc. Copy answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, December 14, 1888. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't. To Comstock & Brown, Esqs., attorneys for plaintiffs. Due service of a copy of an answer, of which the within is a copy, and of the above notice is hereby admitted. Dated New York, December 14, 1888. Comstock & Brown, attorneys for plaintiffs.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 30th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable E. Henry Lacombe, circuit judge.

WILLIAM B. BOGLE *et al.*
vs.
DANIEL MAGONE. } N. S., 12412.

Now comes the plaintiffs, by Albert Comstock, their attorney, and move the trial of this cause.

Likewise comes the defendant, by Henry C. Platt, Esq., assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the plaintiffs and the argument of counsel—

The jury, by direction of the court, say that they find a verdict for the defendant and so they say all.

On motion of Everet Brown, Esq., ordered that the plaintiffs have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An abstract of the minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

14 United States Circuit Court, Southern District of New York.

WILLIAM B. BOGLE *et al.*
vs.
DANIEL MAGONE. } Judgment, March 21st, 1890.

The issues in this action having been brought on for trial before Mr. Judge E. Henry Lacombe and a jury at a circuit court of the October term, 188–, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 30th day of October, 1889, and his costs having been adjusted at $48.85—

Now, on motion of Edward Mitchell, United States attorney for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 21st day of March, 1890.

JOHN A. SHIELDS, *Clerk.*

15 [Endorsed:] 12412. United States circuit court. William B. Bogle *et al. vs.* Daniel Magone. Judgment-roll. Edward Mitchell, United States attorney, attorney for defendant. Filed ——, 188–. Costs, $—. U. S. circuit court. Filed March 21, 1890, 12 m. John A. Shields, clerk.

16 United States Circuit Court, Southern District of New York.

WILLIAM B. BOGLE and Others
vs.
DANIEL MAGONE, Collector, &c. } No. 12412.

Bill of Exceptions.

And afterward, to wit, on the 30th day of October, 1889, this case came on to be tried before Hon. E. Henry Lacombe, U. S. circuit judge, and a jury duly impanelled and sworn to try the issues therein and thereupon. During the trial and before the rendering of the verdict therein counsel for the plaintiffs did take and allege certain exceptions to certain rulings of the court; which said exceptions were by the court duly allowed and are hereinafter specifically set forth. Counsel for plaintiffs introduced evidence tending to show the importation at the port of New York, in 1886 and 1887, of certain so-called "fish pastes" by plaintiffs; the classification thereof as "sauces" by the collector and the payment by plaintiffs of 35 % ad valorem duty thereon in order to secure possession of them; the making of due and timely protests and appeals as to each of such payments, wherein plaintiffs claimed that said "pastes" were not sauces and were dutiable at 25 % ad valorem only as "fish,
17 prepared," and the establishment, in accordance with the requirements of the statute, of suit to recover the excess thus alleged to have been exacted from them in respect to such importations.

One of the plaintiffs, William Y. Bogle, sworn and examined in behalf of plaintiffs, testified that the articles in suit, which he identified by samples in court, were invoiced as anchovy and bloater pastes. The witness had been in the fancy groceries importing business in New York city ever since a time prior to 1883 and had imported the kind of articles in question during all that time. The definition in Webster's Unabridged Dictionary of "sauce," as "a mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish," being read to witness, he testified that the word had a significance in the wholesale commerce of this country in 1883 and theretofore differing from the definition read; that the commercial meaning of a sauce was a liquid, and that was the only particular in which it varied from the definition read.

Q. Was anchovy paste or was bloater paste such as represented by those two samples recognized in trade and commerce in 1883 and prior thereto as a sauce?

A. I think not.

On cross-examination the witness stated that his custom-house broker entered these goods in his entry as sauces, and that he understood the sense of the dictionary definition of sauce to be "anything used as a relish, either liquid or solid, as an addition to the food."

18 Q. What is the use of this article represented here by these samples?

A. Of course, it is an article of food. It is used principally, according to my knowledge, for such use as sandwiches, or as you would eat a domestic article, like potted meats or deviled meats; in the same way this would be eaten as a fish preparation, in my judgment. I never would eat it without bread. I cannot answer whether it was universally used prior to 1883 as a relish. I never used it as a relish. I never used but very little of it. I don't like it. It does not suit my palate. I do not like the flavor of it—not to eat quantities of it. There is no part of the fish—the belly, back, head, or tail—which can be distinguished in this article. It has a fish taste, but no part of the fish can be distinguished in this article. It is all ground up fine. I cannot say what is put with it. It is spiced. Anchovy paste is manufactured out of anchovies and bloater paste out of bloaters. The particular name in trade and commerce in this country prior to March 3, 1883, of these articles was the same as they bear now, to wit, anchovy paste and bloater paste. Those are the only names I know them by and I see them on the trade circulars of different houses by that name.

On redirect examination he testified that his firm imported anchovy sauce, a liquid used for flavoring fish, but he never knew it to be eaten alone or as an addition to bread, as in a sandwich. It is a condiment.

On recross-examination witness testified as follows:

19 Q. The only distinction that you make between the word "sauce" and the article in suit is that you understand that the word "sauce" only covers liquids, while this is a paste?

A. That is the principal point.

Q. That is the point you make?

A. Yes.

Q. And that is the only difference of which you know?

A. I think that covers it.

Q. If that article was a little thinner, so that it could be poured out, would you call that a sauce?

A. I should.

By Mr. COMSTOCK:

Q. It would not then be useful for the purpose for which it is now useful?

A. Not at all, but for an entirely different purpose.

JOHN W. EDGERTON, for seventeen years an importer and wholesale dealer in fancy groceries at New York, sworn and examined as a witness for the plaintiffs, testified as follows: The wholesale trade generally recognized that sauce was something which was in a liquid form entirely, and anything in the solid way was not a sauce in any shape or form.

Q. Did the wholesale trade of this country at the time mentioned (1883 and prior thereto) recognize either of the articles here in evidence (the pastes in suit) as a "sauce" commercially?

A. They did not.

Q. Do you know of any solid article or article of the consistency of those in evidence which was called a "sauce" at that time?

A. No.

Q. What are the uses to which these articles are put?

20 A. Either of them, or any kind of imported paste, as I understand it, are used as direct articles of food and not as an addition to anything to give zest to it, or used in any manner, shape, or form, except in a distinct form, as in a sandwich or the like.

Q. Are they (the fish pastes) used as a condiment at all?

A. No, sir.

Witness further testified that his firm dealt in the article known as "anchovy sauce" or "essence of anchovies," a liquid used to add to meats to give flavor or zest to them, an entirely different use from that of paste. On cross-examination he testified that there was a distinct flavor to this article, and that there was something in it besides the ground fish; that he was not directly familiar with the mode of manufacturing these goods; that there was a spicy taste to it and spices added to it undoubtedly; that he was in the employ of a large importing house which has a suit against the Government on this same question; that he had often eaten the same articles as those in suit with a cracker or cake, eating the paste alone first and the cracker afterwards; probably within 30 seconds after—as soon as he was able to swallow.

JOSEPH T. MCDOWELL, another witness called and affirmed on behalf of plaintiffs, had been continuously in the foreign grocery business in New York since 1866. He testified that he did not consider that an article may be a solid and yet be a sauce.

That the term "sauce," as used in trade in 1883 and there-
21 tofore, had reference to such condiments as were liquids only.

Q. Please state whether the articles represented by the samples before you were in 1883 and prior thereto within that commercial category.

A. They were not.

He presumed that the articles in question (the pastes) were used to be eaten with other food to enrich the food.

Q. Please state the use of sauces.

A. Sauces are used for flavoring considerably and for spicing food and only for that purpose.

Q. Are they used for purposes of nutrition?

A. I think not.

Q. Are these (the fish pastes)?

A. These are.

Witness further testified that his firm dealt in an article of anchovy sauce, viz., the article named "essence of anchovies," which was "altogether different from the fish pastes in suit." It is a fluid; a liquid contained in bottles, and it is simply uncorked and poured out.

On cross-examination he stated that he did not know from positive knowledge what was the use of the article which he knew as "anchovy sauce" or "essence of anchovies," because he never used any of it in his own house, nor did he ever use any of the article in suit in his own house; that he had never seen it (the article in suit) used except with some article of food; that it is highly spiced or seasoned and is salt and has a strong flavor to it and would
22 induce both hunger and thirst. It is an appetizer.

On redirect he was asked:

Have you ever seen the pastes used with other food?

A. I have only seen it used by people tasting or sampling it.

CHARLES E. POPE, for 21 years connected with the house of John Duncan's Sons, fancy groceries, called and sworn as a witness on behalf of the plaintiffs, testified that a sauce, according to the commercial meaning, is a liquid; a paste is a solid and is used as an article of food; that a sauce is used as a condiment, as for flavoring soup and sauces themselves; it is added as a zest to the article.

Q. What is the use of the articles before you?

A. This is used as for a lunch or to spread on toast. You find the anchovy is used as a relish before a meal, and that (the paste) is used in the same way.

Q. Is it nutritious?

A. It is.

Upon cross-examination this witness testified that a cook might take this article and make a sauce out of it; that apple sauce is a liquid to a certain extent; that the article in suit was sometimes used to put on buttered toast and give the toast a nice flavor; that it is spicy and would induce thirst and give an appetite.

After evidence as to the amount involved, showing that under plaintiffs' contention they were entitled to recover $28.10 principal and $4.45 interest to date of trial, or, in all, $32.55, plaintiffs rested.

Defendant's counsel then moved the court to direct a ver-
23 dict for defendant on the ground that the plaintiffs had not proven facts sufficient to entitle them to recover, and on the ground that the term "sauces of all kinds" in the tariff act was a descriptive term of ordinary use, to be taken in its ordinary meaning and not in any restrictive or trade meaning, and on the ground that the ordinary use of the term "sauces" included the articles in suit. This motion was granted by the court; to which ruling and to every part thereof the plaintiffs duly excepted, asking that the case be sent to the jury.

The jury then returned a verdict for defendant.

And forasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said plaintiffs, by their counsel, and it is ordered that the same be filed as part of the record herein, with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand, at New York, this 5th day of March, 1890.

E. HENRY LACOMBE.

Consented to.

EDW'D MITCHELL,
U. S. Att'y.
COMSTOCK & BROWN,
Att'ys for Plaintiffs.

24 Endorsed: 12412. U. S. circuit court, southern district of New York. William B. Bogle *et al. vs.* Daniel Magone, collector, &c. Bill of exceptions. Comstock & Brown, plaintiffs' attorneys, 44 Broadway, New York city. U. S. circuit court. Filed Mar. 19, 1890. John A. Shields, clerk.

25 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

WILLIAM B. BOGLE, RULUF LYLES, ALEXANDER SCOTT, and WILLIAM Y. BOGLE, Pl'ffs in Error,
vs.
DANIEL MAGONE, Defendant in Error.
} Bond for Damages and Costs.

Know all men by these presents that we, Wm. Y. Bogle and F. V. D. Charters, are held and firmly bound unto the above-named

Daniel Magone in the sum of one hundred dollars, to be paid to the said Daniel Magone; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judges of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. Y. BOGLE.
F. V. D. CHARTERS.

Sealed and delivered and taken and acknowledged this 27 day of March, 1890, before me—

W. C. KING,
[L. S.] *Notary Public, N. Y. Co.*

26 [Endorsed:] 12412. U. S. circuit court, southern district of New York. Wm. B. Bogle *et al. vs.* D. Magone, collector, &c. Bond for costs on writ of error. App. M'ch 31, 1890. E. Henry Lacombe. U. S. circuit court. Filed Mar. 31, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

Wm. Y. Bogle and F. V. D. Charters, being duly sworn, do depose and say, and each for himself, that he is worth the sum of two hundred (200) dollars over and above all his just debts and liabilities.

WM. Y. BOGLE.
F. V. D. CHARTERS.

Sworn to this 27th day of March, A. D. 18—, before me—

W. C. KING,
[L. S.] *Notary Public, N. Y. Co.*

27 Supreme Court of the United States.

WILLIAM B. BOGLE *et al.*, Plaintiffs in Error, *vs.* DANIEL MAGONE, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiff in error, by Comstock & Brown, their

attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which (they) (have) lost by occasion of said judgment, &c.

COMSTOCK & BROWN,
Attorneys for Pl'ffs in Error.

28 [Endorsed:] 12412. United States Supreme Court. Wm. B. Bogle *et al.*, plaintiffs in error, *vs.* Daniel Magone, defendant in error. Assignment of errors. Comstock & Brown, attorneys for plaintiffs in error. Due service of a copy of the within assignment of errors is hereby admitted this 1st day of April, 1890. Edward Mitchell, attorney for defendant in error, to —— ——, attorney for — in error. U. S. circuit court. Filed Ap'l 1, 1890. John A. Shields, clerk.

29 Supreme Court of the United States.

WILLIAM B. BOGLE *et al.*, Plaintiffs in Error,
against
DANIEL MAGONE, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Attorney, Attorney for Defendant in Error.

30 [Endorsed:] 12412. United States Supreme Court. William B. Bogle *et al.*, plaintiffs in error, *vs.* Daniel Magone, defendant in error. Joinder in error. Edward Mitchell, U. S. attorney, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 2nd day of April, 1890. Comstock & Brown, attorneys for plaintiffs in error. To Comstock & Brown, attorneys for plaintiffs in error. U. S. circuit court. Filed April 2, 1890. John A. Shields, clerk.

31 UNITED STATES OF AMERICA, *ss:*

To Daniel Magone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William B. Bogle, Ruluf Lyles, Alexander Scott, and William Y. Bogle are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated March 31st, 1890.

E. HENRY LACOMBE.

32 [Endorsed:] E. & A. A. 903. 12412. U. S. Supreme Court. Wm. B. Bogle *et als.*, plaintiffs in error, against Daniel Magone, defendant in error. Citation. Comstock & Brown, attorneys for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 1 day of April, 1890. Edward Mitchell, attorney for defendant in error. U. S. circuit court. Filed Apr. 1, 1890. John A. Shields, clerk.

Endorsed on cover: Case No. 14331. S. New York C. C. U. S. No. 291. William B. Bogle, Ruluf Lyles, Alexander Scott, and William Y. Bogle, plaintiffs in error, *vs.* Daniel Magone, collector of the port of New York. Filed October 18, 1890.

Office Supreme Court U. S.
FILED,
MAR 15 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM No. 291.

WILLIAM B. BOGLE ET AL.,
Plaintiffs in Error,

vs.

DANIEL MAGONE, COLLECTOR, &C.,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

EVERIT BROWN,
Of Counsel,
80 BROADWAY,
New York.

COMSTOCK & BROWN,
Attorneys for Plaintiffs in Error.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

WILLIAM B. BOGLE, RULUF LYLES, ALEXANDER SCOTT and WILLIAM Y. BOGLE, Plaintifis in Error, vs. DANIEL MAGONE, Collector of the Port of New York, Defendant in Error.	October Term, 1893. No. 291.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is a case arising under the customs revenue laws of the United States, to wit, the Tariff Act of March 3, 1883, entitled "An Act to reduce internal-revenue taxation, and for other purposes" (22 Stat. at L., 488–526).

In 1886 and 1887 the plaintiffs, doing business as Bogle & Lyles, imported at New York certain fish paste, namely, anchovy paste and bloater paste. The defendant in error, then Collector of the Port of New York, exacted a duty of 35 per cent. *ad valorem* on this merchandise as *sauces*, under the following paragraph:

> Pickles and *sauces*, of all kinds, not otherwise specially enumerated or provided for in this act, thirty-five per centum *ad valorem* (R., p. 8, fol. 16).

The importers claim that the merchandise was properly subject to duty at only 25 per cent. *ad valorem* as *fish, prepared*, under the following paragraph:

> Salmon, and all other *fish, prepared* or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, twenty-five per centum *ad valorem* (R., p. 8, fol. 16).

Both of these provisions are found in "Schedule G—Provisions" (22 Stat. at L., 504) of the act before referred to.

At the trial of the action it was shown that the plaintiffs in error had paid to the defendant in error, in order to secure possession of their goods, the sum of $28.10 in excess of what they claimed to be the proper amount of duty (R., p. 12, fol. 22), and that they had, by due and timely protest, appeal and suit, complied with the technical statutory requirements to secure a recovery (R., p. 8, fol. 16).

By testimony introduced at the trial in behalf of the plaintiffs in error the following facts were proven without contradiction:

Anchovy paste and bloater paste are prepared from the fish whose names they respectively bear, by grinding the fish up and spicing them (Bogle, R., p. 9, fol. 18; Edgerton, R., p. 10, fol. 20).

These fish pastes are nutritious and are used as articles of food; they are eaten like potted meats, sometimes with bread in the shape of sandwiches, sometimes in alternate mouthfuls with crackers; anchovy paste is sometimes used as the anchovy is used—as a relish before a meal; but fish pastes are not condiments nor used as condiments nor as additions to other articles of food (Bogle, R., p. 9, fol. 18; Edgerton, R., p. 10, fol. 20; McDowell, R., p. 11, fol. 21; Pope, R., p. 11. fol. 22).

That in the wholesale trade and commerce of this country at the time of the passage of the act in question

there was a meaning to the term "sauce" different from the ordinary meaning; that the commercial names of the articles in suit were "anchovy *paste*" and "bloater *paste*;" that these were not within the commercial understanding and use of the term "sauce;" that there was an article known as "essence of anchovies," or "anchovy sauce," which was different from the merchandise at bar in form, character and use as well as in name; that all articles known to trade as sauces were in a liquid form, were used as condiments, were not nutritious, were not used as separate articles of food, and, in short, had an entirely different form, character and use from those of pastes (Bogle, R., p. 9, fols. 17, 18, p. 10, fols. 19; Edgerton, R., p. 10, fols. 19, 20; McDowell, R., p. 11, fol. 21; Pope, R., p. 11, fol. 22).

The plaintiffs in error having rested, the counsel for the defendant in error moved the Court to direct a verdict in his favor, which motion the Court granted on the grounds that the merchandise at bar was within the popular definition of the word "sauce," and that the tariff phrase "pickles and sauces of all kinds" was not to be construed according to the understanding of commercial men (40 Fed. Rep., 226, 228), and a verdict was directed accordingly. To this ruling and direction exception was duly taken by, and allowed to, the plaintiffs in error, who bring this writ of error to review the judgment (R., p. 12, fols. 22, 23).

Assignment of Errors.

The plaintiff in error assigns for error:

1. The ruling of the Court below that the merchandise at bar was within the popular definition of the word "sauce."

2. The ruling that the tariff phrase "sauces of all

kinds" was not to be construed according to the understanding of commercial men.

3. The granting of a motion of counsel for defendant in error and directing a verdict accordingly.

4. The judgment entered in favor of the defendant in error upon such directed verdict.

POINTS.

The merchandise involved in this case is unquestionably prepared fish. As such, it is unquestionably dutiable at only 25 per cent. *ad valorem* unless it is a "sauce" within the meaning of the statute. We maintain that the statute is to be construed according to the understanding of commercial men, and that, the law being so construed, the merchandise at bar is not a sauce; but that, even if the words of the law are to receive their popular meaning, still this merchandise is not a sauce. It will be a sufficient ground for reversal either if the merchandise be not a sauce in the ordinary use of the word, or if it is held that the language of the statute should be commercially construed.

I.

These fish pastes are not in fact sauces.

That is to say, they are not sauces in the ordinary and popular understanding of the word. How shall we decide what the common understanding of a word is?

In such cases, resort is usually had to the dictionaries, which are useful guides if not of final authority.

Toplitz vs. Hedden, 33 Fed. Rep., 617, 618.
Nix vs. Hedden, 149 U. S., 304, 307.

Webster's germane definition is as follows :

> " A mixture or composition to be eaten with food for improving its relish ; a relishing condiment; appetizing addition to the principal material of a dish."

Worcester's applicable definition is this :

> " Something eaten with food to improve its relish ; any savory, relishing addition to food ; anything stimulating ; seasoning."

" The Century " gives this :

> " A condiment, as salt or mustard ; now, usually, an accompaniment to food, usually liquid or soft, and highly seasoned or flavored, eaten as a relish, an appetizer, or a digestive ; as, mint-*sauce ;* white-*sauce ;* lobster-*sauce ;* sauce *piquante.*"

The words of lexicographers are, of course, not to be interpreted as exactly and strictly as those of a penal statute. Combining the evident meaning of them, however, with the common knowledge possessed by every one, we may notice two points, one affirmative and one negative, which, beside others, seem essential always in the ordinary meaning of the word " sauce." First, a sauce is used as an addition to articles of food. Second, it is not itself an article of food, that is, it is not usually adapted for separate consumption nor even for consumption in equal or superior proportions with undisputed food articles. A sauce is commonly of such a pungent, biting, oily, sweet or rich character as to demand that its use be merely accessory.

Now, the merchandise in suit fails to answer either of these essentials in the common idea of a sauce. First, it is not used as a seasoning, flavoring or mere addition to food (R., p. 9, fol. 18; p. 10, fol. 20). Second, it is used, on the other hand, as itself an article of food (R., p. 9, fol. 18; p. 10, fol. 20; p. 11, fol. 21; p. 11, fol. 22).

Both its affirmative and its negative distinction from a sauce doubtless follow from its nature. It is probably not sufficiently high in seasoning or desirable in flavor for giving taste to other articles, while this very fact makes it eatable quite alone, as the anchovy is eaten before a meal (R., p. 11, fol. 22), or in alternating combination with crackers, each being taken into the mouth separately (R., p. 10, fol. 20), or in preponderating combination, as in sandwiches, where the bread would be merely a vehicle and, perhaps, a diluter (R., p. 9, fol. 18; p. 10, fol. 20).

The mere fact that a substance has high flavor does not make it a sauce, as we see in the case of cheese, nor that it is highly seasoned, as in the case of deviled meats, nor that it is eaten with bread in a sandwich, as in the case of sardines. Nor are all relishes considered sauces, or olives and radishes would be such. It is not enough that a substance is stimulating to the appetite, or all cocktails would be sauces. It is not enough that a thing is an appetizer, or we should be placing a tax of 35 per cent. *ad valorem* on a brisk walk of a winter morning, and the man who returned from such an appetizer declaring that he felt 100 per cent. better, would find his renewed capital of strength seriously depleted at once. We all have heard and probably experienced the fact that the best sauce is hunger, but it would be a curious thing to levy a duty on the immigrant's hunger—unless, indeed, it were exempted as a "personal effect."

In short, we cannot treat dictionary definitions as of infallable and literal exactitude. In this case, if their evident intent be taken, they are a correct expression

of the common understanding. The essentials of their meaning, leaving aside those not here in controversy, are the ones we have pointed out. By those criterions our merchandise is not a sauce. It is not disputed that from anchovies and from bloaters sauces might be made; in fact, it was shown at the trial that there is an anchovy sauce, but that it was not the same article, nor for the same uses that we have here (R., p. 9, fol. 18; p. 10, fols. 19, 20; p. 11, fol. 21). This same recognition and this same distinction are made by the Century Dictionary, which under the word "anchovy," says:

> "A sauce held in much esteem is made from anchovies, by pounding them in water, simmering the mixture for a short time, adding a little cayenne pepper, and straining the whole through a hair sieve. Anchovy *paste*, a preparation of anchovy and various clupeids (sprats, etc)."

By their difference in character and their difference in use, indicated by their difference in name, anchovy and bloater *pastes* are not *sauces*.

The interpretation of words of common speech is a matter of law, and is for the Court.

Toplitz vs. Hedden, 146 U. S., 252, 257.

A wrong interpretation, either perverse or too narrow or too wide, prejudicial to the defeated party, is therefore an error of law, which is a sufficient ground for reversal.

II.

The tariff term "sauces" should be interpreted commercially.

The more important error of the Court below was in directing a verdict in favor of the Collector on the un-

contradicted testimony that the word "sauces" had a commercial meaning, which differed from the common meaning, and which excluded anchovy paste and bloater paste. This error was more vital because it struck at the heart of our case, and because it is so violently opposed to the rulings of this Court.

It is true that this Court has held that the rule of commercial interpretation is not always to be followed (notably in the case of Maillard vs. Lawrence, 16 How., 251) But where such has been the ruling of the Courts, it has always been because of peculiar circumstances, or because of language that precluded a commercial definition.

Ulhman vs. Hedden, 38 Fed. Rep, 95, 97.
In re Salomon, 48 Fed. Rep., 287, 288.
De Forest vs. Lawrence, 13 How., 274, 282.
Maillard vs. Lawrence, 16 How., 251, 261.
Greenleaf vs. Goodrich, 101 U. S., 278, 284.
Hedden vs. Richard, 149 U. S., 346, 349.
Magone vs. Heller, 150 U. S., 70, 74.

On the other hand, the rule of commercial interpretation has been proclaimed the guiding one, over and over again. One of the early cases containing this doctrine was that of United States vs. 200 Chests of Tea (9 Wheat., 430), decided in 1824, and from that date to the present there has been no deviation in this Court from this doctrine, except for special reasons. With the possible exception of Magone vs. Heller, *supra*, where it was said that "the agricultural use must prevail over the scientific or commercial nomenclature," a careful study of the decisions shows that for the last decade, if not longer, there has not been a single refusal to recognize the controlling nature of the rule in question for any reason whatever. The most recent decisions reiterate, with increasing emphasis, the rule that "the commercial designation * * * is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws."

Arthur vs. Morrison, 96 U. S., 108, 110.

Schmeider vs. Barney, 113 U. S., 645, 647, 648.
Arthur's Executors vs. Butterfield, 125 U. S., 70, 75.
Robertson vs. Salomon, 130 U. S., 412, 415.
Seeberger vs. Cahn, 137 U. S., 95, 97.
Am. Net & Twine Co., vs. Worthington, 141 U. S., 468, 471.
Toplitz vs. Hedden, 146 U. S., 252, 256.
Hedden vs. Richard, 149 U. S., 346, 349.

It is only when the commercial designation fails to give an article its proper place in the classification of the laws that resort is to be had to the lexicographers or other sources of interpretation.

In re Herman *et al.*, 56 Fed. Rep., 477, 478 (Circuit Court of Appeals, Second Circuit).
Toplitz vs. Hedden, 146 U. S., 252, 256.

Let us consider for a moment some of the various terms which have been held by the Courts to be subject to a commercial interpretation if such is proven.

"Bohea tea," U. S. vs. 200 Chests of Tea, 9 Wheat., 430.
"Refined sugar," Barlow vs. U. S., 7 Pet., 404.
"Silk laces," Arthur vs. Lahey, 96 U. S., 112.
"Silk gloves," Arthur vs. Unkart, 96 U. S., 118.
"Silk veils," Arthur vs. Morrison, 96 U. S. 108.
"Brass buttons," Erhardt vs. Ullman, 1 U. S. App., 257.
"Pile fabrics," *In re* Herrman, 56 Fed. Rep., 477 (Cir. Ct. of App.).
"Beans" and "Vegetables," Robertson vs. Salomon, 130 U. S., 412.
"Bonnets, hats and hoods,'" Toplitz vs. Hedden, 146 U. S., 252.
"Womens' and children's dress goods," Arthur vs. Butterfield, 125 U. S., 70.
"Preparations fit for use as starch," *In re* Townsend, 56 Fed. Rep., 222 (Cir. Ct. of App.).

"Of similar description," Schmieder vs. Barney, 113 U. S., 645.
"Finished"—as applied to furniture, Hedden vs. Richard, 149 U. S., 346.

Now, in the face of these overwhelming authorities, what reason is suggested for making an exception in the present case?

It cannot be on the ground that we seek to rely on a commercial definition that departs from Webster's definition only in respect to the consistency of a substance. Although some of the testimony would seem to indicate merely a narrow distinction, yet the whole commercial testimony taken together cannot be read without perceiving that the witnesses expressed a difference in character and name and use as well as a difference in consistency. Commercial men on the witness stand can hardly be expected to give definitions on the spur of the moment even as exact as those of lexicographers. And we are not aware that the decisions require commercial testimony to take the form of precise definition. It is the "understanding" not the definition of commercial men that is controlling. It is sufficient that in trade and commerce a tariff phrase has a distinct meaning and that the witnesses testify directly whether a given article is within or without that meaning. Nor is it requisite that the reason for a commercial distinction should appear to the uninitiated. Were there no difference between the popular and the commercial meanings of words, there would have been no necessity of formulating the rule of interpretation so well established by this Court. Of necessity, therefore, to one ignorant of the usages of a particular trade, the use of words in such trade must seem in many cases to be peculiar and arbitrary. Finally, even were the distinction in the present case so narrow as to be the mere difference between a liquid and a solid, it is no narrower than many which have prevailed in previous cases. On the basis of commercial usage such narrow distinctions as

the following have been made: Crepe veils of silk are not "silk veils" (Arthur vs. Morrison, *supra*); laces of silk are not "silk laces" but "thread laces" when made in a particular way (Arthur vs. Lahey, *supra*); astrakhan cloths are not "pile fabrics" because the pile is uncut (*In re* Herrman, *supra*); handkerchiefs, hemmed and also hemstitched, are not "hemmed handkerchiefs" (*In re* H. B. Claflin Co., 47 Fed. Rep., 875, affirmed on appeal).

Nor can the attempt to make this case an exception to the rule of commercial interpretation be effectively based on the ground that the word whose commercial import is sought is the word "sauces." That, by itself, would be as much within the rule as any of the terms we have previously enumerated where the commercial test has been applied by the courts. Does, then, the phrase "of all kinds," so affect the word "sauces" as to exclude the idea of commercial interpretation? We think not. It need hardly be argued that this phrase certainly does not so enlarge the preceding word as to include articles that are not sauces at all. A provision for "dress goods of all kinds" would not include upholstery goods. A provision for "carriages of all kinds" would no more include boats than a simple provision for "carriages" would include them. The expression "sauces of all kinds" is no less denominative than the word "sauces," and the inquiry would be just as pertinent in one case as in the other whether an article is commercially known as a sauce. The addition of the phrase "of all kinds" does not make a descriptive out of a denominative provision, does not drag the language of the statute out of the customary rule in interpreting tariff laws and put it within the reason of the exceptions to this rule.

We are not proposing to render meaningless the phrase "of all kinds." There are sauces of various kinds, both by derivation and use, such as vegetable sauces, meat sauces, fish sauces, fruit sauces. Congress might have provided for one of these kinds without

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We are not proposing to render meaningless the phrase "of all kinds." There are sauces of various kinds, both by derivation and use, such as vegetable sauces, meat sauces, fish sauces, fruit sauces. Congress might have provided for one of these kinds without

providing for the others, as, in fact, it did in the Tariff Act of 1890, according to the construction in the unappealed case of *In re* Johnson *et al.* (56 Fed. Rep., 822), where the present point in controversy was not essential, and was not discussed. In the Act of 1883 Congress doubtless used the words "of all kinds," because without them it might have been supposed or claimed that only, say, vegetable sauces were here provided for. It was out of abundance of caution that this language was adopted. Congress is not presumed to use meaningless words, but it not infrequently employs tautology to make its meaning clear beyond peradventure, as, for instance, in the last clause of "Schedule C—Metals," of the act under discussion (22 Stat. at L., 501), where all the words from "iron" to "any other," inclusive, are quite unnecessary.

In the only two cases of which we are cognizant where there was discussed the application of the rule of commercial usage to tariff phrases accompanied by the words "of all kinds," such application was distinctly upheld. In the unappealed case of Robbins vs. Robertson (33 Fed. Rep., 709), the phrase "jewelry of all kinds" was held to include imitation jewelry as well as real jewelry, and the test of what was jewelry of *any* kind was held to be commercial usage. In the case of Hahn vs. Erhardt (46 Fed. Rep., 519), the phrase "precious stones of all kinds" was held to include semi-precious stones as well as precious stones, and the rule of commercial usage was referred to as applicable. On appeal the case was reversed on other grounds (55 Fed. Rep., 273), but with a still clearer recognition of the applicability of the rule in question.

We, therefore, maintain that the phrase "sauces of all kinds" includes only articles that are sauces of *some* kind; that the determination of this question depends on commercial usage if proven; that a commercial distinction, however arbitrary or narrow, is, if clear, perfectly sufficient.

In short, from all these considerations, we fail to see

any reason for departing here from the well-settled rule of commercial interpretation. And, if this rule is to be followed, it needs no argument to indicate the error made by the Court below. The importers produced four witnesses who united in testifying that the merchandise in suit was commercially known as anchovy *paste* and bloater *paste*, that it was not known as *sauce*, and that it was not within the commercial understanding and meaning of the word *sauce* (R., p. 9, fols. 17, 18; p. 10, fol. 19; p. 11, fols. 20, 21, 22). The defendant below did not offer any opposing evidence (R., p. 12, fol. 23). The Court, nevertheless, directed a verdict for the defendant in error, and judgment was rendered accordingly (R., p. 12, fol. 23).

III.

Our position briefly summed up is this: The phrase "of all kinds" is intended to secure beyond question a duty of 35 per cent. *ad valorem* on all sauces, vegetable or otherwise. But it does not make that a sauce which is not a sauce. It does not bring the clause within the exceptions to the rule of commercial interpretation. The word "sauces" should, therefore, be interpreted according to the understanding of commercial men. So interpreted, the uncontradicted evidence shows that the merchandise in suit was not sauce. But if the commercial interpretation is not to prevail, then, and only then, can resort be had to the ordinary and popular meaning. Even so, the merchandise in suit is distinguished from sauce in essential particulars. It follows that the Court below erred in one or more vital respects.

IV.

The judgment should be reversed and the case remanded, with directions to set aside the verdict, and to order a new trial.

EVERIT BROWN,
Of Counsel.

COMSTOCK & BROWN,
Attorneys for Plaintiffs in Error.

Supreme Court, U.S.
FILED.
MAR 10 1894
JAMES H. McKENNEY,
CLERK

CASE No. 14331.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM B. BOGLE ET AL., plaintiffs in error,
v.
DANIEL MAGONE, COLLECTOR OF the port of New York.
} No. 291.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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OCTOBER TERM, 1893.

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v.
DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK.
} No. 291.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This was a suit to recover duties overpaid. The importations were made in 1886 and 1887, so that the case is governed by the tariff act of 1883. The articles imported were anchovy paste and bloater paste. They were classified by the collector as "sauces." The importers claimed that they should have been classified as "fish, prepared." It is claimed also as to the anchovy paste that it should have been classified as "anchovies." The case was tried

before Judge Lacombe and a jury. A verdict was directed for the collector, on the ground that the importations were "sauces;" evidence of a more restricted commercial designation being held by the court to be incompetent, as, in the opinion of the trial judge, the word "sauce" was to be given its colloquial rather than any commercial designation.

STATEMENT OF FACTS.

The goods were entered as sauces by the custom-house broker. (p. 9.)

They consisted of anchovies or bloaters, as the case might be, ground up fine and spiced, usually eaten with bread in the form of sandwiches, though sometimes eaten in alternate mouthfuls with crackers and sometimes eaten with other food to enrich it. The paste is not merely a flavoring article, but is nutritious, though too highly spiced and flavored to be eaten alone. It is an appetizer and is not in liquid form.

The fish of which the paste is made are ground into particles too small to enable the different parts of the fish to be identified. The paste, however, has still a fishy taste, although spiced.

The witnesses testified that the paste was not a sauce according to the usages of the "wholesale commerce of this country." They all united in saying that the test of a sauce was its liquid character, and that if these articles were in a liquid form they would be sauces. Defendant introduced no testimony, a verdict being directed at the close of the plaintiffs' case.

The relevant statutory provisions are as follows:

> Par. 281. Anchovies and sardines, packed in oil or otherwise * * * [various rates]; when imported in any other form, 40 per centum ad valorem.
>
> Par. 283. Salmon, and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, 25 per centum ad valorem.
>
> Par. 284. Pickles and sauces, of all kinds, not otherwise specially enumerated or provided for in this act, 35 per centum ad valorem.

ARGUMENT.

To succeed in this case, plaintiffs in error must establish that the articles were not sauces. To succeed as to the anchovy paste, they must also establish that the articles were not anchovies within the meaning of the act of 1883. It will, of course, be necessary to order a new trial if there is error so far as the bloater paste is concerned, even if the plaintiffs in error are entitled to no relief so far as the anchovy paste is concerned. An expression of opinion is, however, respectfully asked of the court, in order that, if a new trial be ordered, further unnecessary proceedings may be avoided.

I.

SAUCES.

The ordinary meaning of the word "sauce" can be judicially noticed, and is not here in dispute. Plaintiffs

in error in their brief cite the same definition relied upon by the trial court, namely, that of Webster:

> A mixture or paste to be eaten with food for mproving its relish; a relishing condiment; an appetizing addition to the principal material of a dish.

As *res nova*, we should be strongly inclined to concede that the articles in question were "fish prepared," rather than "sauces," within the meaning of the act. They certainly are "fish prepared," whether or not they are also "sauces;" "fish prepared" would seem to be the more specific denomination, and therefore the denomination which should govern under the principle of *Robertson* v. *Glendenning* (132 U. S., 158), and *American Net and Twine Co.* v. *Worthington* (141 U. S., 468). It may, on the other hand, be suggested that the word "sauces," expressing by its dictionary definition the use of the article, governs its specific denomination under *Magone* v. *Heller* (150 U. S., 70). See also *Ferguson* v. *Arthur*, 117 U. S., 482.

There is certainly, however, some ambiguity in the statute, and past Treasury construction is, therefore, of great if not controlling weight. (*Robertson* v. *Downing*, 127 U. S., 607, and cases cited.) In *Earnshaw* v. *Cadwalader*, (145 U. S., 247, 258) this court approved the opinion of Attorney-General Garland (18 Op., 530) to the following effect:

> * * * that, if the departmental practice and interpretation as to the collection of customs * * * had been of long standing and uniform prior to 1883, it was to be presumed that, if such interpretation had

> been false and vicious, Congress would have guarded against a like interpretation of the act of 1883; that, as that act had not repudiated any prior interpretation, the presumption was very strong that Congress, in enacting the act of March 3, 1883, had understood * * * what the practice of the Department had established. (See also to the same effect *Maddux* v. *United States*, 20 Ct. Cl., 193, 198.)

If certain language in a tariff law has received departmental interpretation, especially if that interpretation has become publicly known through the published decisions of the Department, the presumption is strong that Congress, in readopting the same language subsequently, adopts therewith its settled interpretation. As a matter of fact, we know that Congress enacts each tariff law with the departmental interpretation of its predecessor kept in view. Departmental interpretation differs from judicial interpretation only in weight, (*Schell's Exrs.* v. *Fauché*, 138 U. S., 562, 572); and it has been long settled that reenactments of statutory language that has been judicially interpreted carry with them the judicial interpretation that has been given. (*Dollar Savings Bank* v. *United States*, 19 Wall., 227,237; *The Anna*, L. R., 1 P. D., 253, 259; *McDonald* v. *Hovey*, 619, 110 U. S., and cases cited; *Metropolitan Railroad Co.* v. *Moore*, 121 U. S., 558, 572.)

The Revised Statutes rated both sauces and prepared fish at 35 per centum ad valorem, while the act of February 8, 1875, chap. 36, rated anchovies imported in any other form than packed in oil at 60 per centum ad valorem. Anchovy paste was imported in 1878 and assessed by the

collector as "anchovies." The importers appealed to the Secretary of the Treasury, claiming that it was to come under the head of "sauces." The Secretary sustained this claim, and reversed the action of the collector on March 4, 1878 (Syn. Dec. 3492). This decision, although not mentioned by Judge Lacombe in his charge to the jury, was relied upon by the district attorney in the case at bar (40 Fed. Rep., 226, 227).

It is respectfully submitted that Congress, by reenacting the statutory provision then in force without substantial variation, except in the rates of duty, intended to adopt and ratify its departmental construction.

It will be noticed that the importers in 1878 did not refer to the prepared fish provision. It will be remembered that their appeal related only to anchovy sauce and paste. The importers doubtless recognized the force of the argument, which we shall make under our next heading, that as between the anchovy clause and the prepared fish clause the former was more specific, and therefore would control.

While, were it not for this Treasury decision, we should be much inclined to concur in the position of the plaintiffs in error so far as the applicability of the sauce clause is concerned, we do not all concur in his position as to the competency or sufficiency of the evidence introduced in this case upon the issue of commercial designation.

The general principles as to commercial designation are, of course, well settled. It would seem to be unnecessary as to these general principles to go further back than the decision in the "China toy case," *Cadwalader* v. *Zeh*

(151 U. S., 171, 176), where the rule is laid down as to the construction of the tariff acts—

> that if the words used therein to designate a particular kind or class of goods have a well known signification in our trade or commerce different from their ordinary meaning among the people, the commercial meaning is to prevail, *unless Congress has clearly manifested a contrary intention.*

This case, if we understand it correctly, narrowly restricts, if not overrules, the *dictum* in *Hedden* v. *Richard* (149 U. S., 346, 349), as to the construction of clauses "taxing an article which everyone in the community might be expected to import," and using "words which everyone understands, and which, unless taken in the ordinary sense, would mislead the whole community, and can not, therefore, be supposed to be intended in any other sense unless there is something to indicate such intention."

The word "sauces" is no more familiar than the word "toys." It is respectfully submitted, however, that the present case comes clearly within the exception recognized in *Cadwalader* v. *Zeh*, *supra*. While the word "sauces" used alone would show no sign of any intended designation other than the commercial one, yet the words "of all kinds," thereto appended, indicate an intention that the general meaning of the word "sauces" should not be *restricted* by any evidence as to previous use. The word "sauces" alone is denominative; "sauces *of all kinds*," is descriptive. There are many general phrases of this sort found in our tariff laws, which evidently indicate an intention to include all goods of a given description irrespective of their trade names or of their common names.

The authorities fully sustain this argument.

Two cases in point are set forth and approved by the court in its opinion in the *Cadwalader* case, above cited, namely, *Maillard* v. *Lawrence* (1 Blatch., 504, and 16 How., 251), relating to "wearing apparel of *every description*," and *Barber* v. *Schell* (107 U. S., 617), relating to "*all* manufactures composed wholly of cotton" This court quotes, in relation to the former phrase, the language of Mr. Justice Nelson at circuit:

> This phraseology for the purpose of describing a dutiable article * * * was introduced for the purpose of describing a class of articles, not as known in trade or commerce by any trade appellation, but by the actual use to which they were designed, and to which they were adapted, taken in connection, etc. * * * Congress intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article.

In *Magone* v. *Luckemeyer* (139 U. S., 612, 614) the question related to the phrase "women's and children's dress goods * * * if composed *wholly* of wool, worsted, the hair of the alpaca, goat, or other animals, or of a mixture of them." It appeared that the goods contained 98 per cent wool and 2 per cent cotton; that the goods were indistinguishable from all-wool goods, and the cotton could be discovered only by chemical analysis; and that the cotton was introduced solely to change the classification of the goods.

> The defendant further requested the court to charge that if the jury found that the goods were

> women's dress goods substantially composed of wool, and *known in trade and commerce* as all-wool fabrics, the defendant was entitled to a verdict. The court refused so to charge, and the defendant excepted.

This court (Justices Gray and Brown dissenting) sustained the ruling. The statutory language seems to have been held descriptive and not denominative, and therefore not subject to evidence as to trade denomination.

The words "manufactures of wool" were held in *Elliott* v. *Swartwout* (10 Pet., 137) and *Seeberger* v. *Cahn* (137 U. S., 95) to be subject to restrictive evidence of commercial designation. This, however, rested on an independent principle. The goods in suit in those cases were manufactures of worsted. The statute in each case referred to manufactures of worsted as well as manufactures of wool. It appeared in each case that worsted was a product of wool. It was therefore evident on the face of the statute itself that the phrase "manufactures of wool" was subject to exceptions. The question for the jury was whether the articles then at bar were contained in one or other of two statutory classes, namely, "manufactures of worsted" or "manufactures of wool not being worsted." This question, from its technical character, was necessarily to be settled by expert evidence as to the nature of worsted. The case of *Arthur* v. *Cumming* (91 U. S., 362), relating to "all burlaps" and "all oil-cloth foundations," oil-cloth foundations being a variety of burlaps, went off on the same principle.

The two circuit court decisions referred to by the learned counsel for the plaintiffs in error (*Robbins* v.

Robertson, 33 Fed. Rep., 709, and *Hahn* v. *Erhardt*, 46 Fed. Rep., 519) admitted proof of commercial designation in construing the words "of all kinds," but the proof was offered to enlarge, not to restrict, the application of those words. Proof was offered in those cases that besides the articles commonly known as jewelry and precious stones, respectively, there were other articles known by those names in commerce, namely, imitation jewelry and sémi-precious stones. The proof thus showing that there were kinds of jewelry, etc., known to commerce besides the kinds of jewelry, etc., known to the public at large, the phrase "of all kinds" was held all-comprehensive. These cases are not applicable to the case at bar, where the endeavor is to restrict, not to enlarge, the plain statutory meaning. Counsel for plaintiffs have been unable to find any other decisions where the application of the rule of commercial usage to tariff phrases accompanied by the words "of all kinds" has been discussed. We can add to the collection the case of *De Forest* v. *Lawrence* (13 How., 278), where the phrase "skins of all kinds" was under consideration; but that case went off on still a different principle, namely, the presumption that Congress intends each tariff act to be interpreted according to the interpretation of its predecessors.

Plaintiffs here admit that their "commercial designation" is restrictive. It excludes such sauces as apple sauce, cranberry sauce, hard sauce for plum pudding, and mayonnaise sauce.

II.

ANCHOVIES.

Assuming the articles to be "fish prepared" rather than "sauces," nevertheless the anchovy paste can properly be described as "anchovies * * * imported in any other form." This provision is taken from the act of February 8, 1875, and is thus more recent in origin than the others, which come from the Revised Statutes. It is respectfully submitted that the anchovy clause controls, both because it is the more specific (*Robertson* v. *Glendenning*, 132 U. S., 158; *American Net and Twine Co.* v. *Worthington*, 141 U. S., 468; and cases cited in *Seeberger* v. *Cahn*, 137 U. S., 95), and because when two rates are equally applicable, the higher rate controls (Revised Statutes, § 2499, as amended in 1883; *Liebenroth* v. *Robertson*, 144 U. S., 35, 40; *Dieckerhoff* v. *Robertson*, 40 Fed. Rep., 568).

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney-General.

O

152 U.S. 628

RECORD, CASE NO. 14360.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 314.

LEVERETT SALTONSTALL, COLLECTOR OF CUSTOMS FOR THE PORT OF BOSTON AND CHARLESTON, PLAINTIFF IN ERROR,

vs.

EDWARD T. RUSSELL AND CLARENCE B. MITCHELL, COPARTNERS, AS EDWARD T. RUSSELL & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 20, 1893.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Edward T. Russell and Clarence B. Mitchell, merchants and copartners, doing business in Boston under the name and style of Edward T. Russell and Company, plaintiffs, and Leverett Saltonstall, collector of customs for the port of Boston and Charlestown, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by

LE BARON B. COLT,
U. S. Circuit Judge.

2 *Return of writ of error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court, this first day of October, A. D. 1890.

[SEAL.] JOHN G. STETSON,
Clerk.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Before the honorable Le Baron B. Colt, circuit judge.

EDWARD T. RUSSELL AND CLARENCE B. Mitchell, merchants and copartners, doing business in Boston, in said district, under the name and style of Edward T. Russell and Company, plaintiffs,
v.
LEVERETT SALTONSTALL, COLLECTOR OF CUSTOMS for the port of Boston and Charlestown, defendant. In an action of contract: Ad damnum, $200.

No. 3013, Law Docket.

4 *Plaintiffs' declaration.* (*Filed with writ May* 15, 1888.)

And the plaintiffs say that heretofore, to wit, on the twenty-second day of October, in the year eighteen hundred and eighty-seven, they imported into the port of Eastport, within the revenue district of Passamaquoddy, from New Castle, in the British Province of New Brunswick, in a certain steam vessel called the Cumberland, certain goods, wares, and merchandise, to wit, certain blueberries in cans, to wit, five hundred cases, containing twelve thousand cans of blueberries; that the date of the invoice of said canned blueberries is the eighteenth day of October, A. D. 1887; that the date of the entry of said canned blueberries at the custom-house at Eastport aforesaid is the twenty-second day of October, A. D. 1887; that said goods, wares, and merchandise were entered at Eastport aforesaid by John Thompson, master of said steamship, and were transported in bond to the port of Boston, in the revenue district of Boston and Charlestown; that said goods, wares, and merchandise were entered for re-warehouse and withdrawal for consumption at the custom-house at Boston aforesaid on the eighteenth day of November, A. D. 1887; that the cases and cans or other coverings containing said blueberries, and the cost of packing the same, were not then by law subject to be estimated as part of the value of said goods, wares, and merchandise in determining the amount of duties for which they were liable upon being imported into the United States as aforesaid, yet the said defendant, then and now collector
5 of customs at the said port of Boston, under color of a law of the said United States for the collection of duties on imports, assessed as and for customs duties upon said goods, wares, and merchandise the sum of one hundred and forty-four dollars, a sum estimated upon the value of the said goods, wares, and merchandise, including therein the value of the cases, cans, and other coverings containing said blueberries and the cost of packing the same—that is to say, a sum exceeding by eighty-one dollars the true amount to which as duties the said goods were subject; and the plaintiffs, on the eighteenth day of November, 1887, appealed

from said assessment to the Secretary of the Treasury, and afterwards, to wit, on the seventh day of January, 1888, received from J. G. Macgregor, chief of the division of customs, a communication, dated the fifth day of January, 1888, addressed to said plaintiffs, and informing them that the case had been disposed of by instructions to the collector of customs at said port of Boston; and the said defendant demanded, exacted, and received from the plaintiffs, as and for customs duties upon said canned blueberries, the full amount assessed by him as aforesaid, being eighty-one dollars in excess of the sum to the payment of which to the said United States as customs duties said canned blueberries were by law subject upon being imported as aforesaid; and on the eighteenth day of November, 1887, the plaintiffs, for the purpose of obtaining possession of said canned blueberries, and under protest filed against the exaction thereof, on the eighteenth day of November, 1887, paid the said sum so assessed by the
6 defendant, as aforesaid; and the defendant owes the plaintiffs said sum of eighty-one dollars, with interest thereon from the said eighteenth day of November, A. D. 1887.

By their attorney:

FREDERIC CUNNINGHAM.

Second count. And the plaintiffs say the defendant owes them eighty-one dollars, with interest thereon, according to the bill of particulars hereunto annexed, for money received by the defendant to the use of the plaintiffs.

By

FREDERIC CUNNINGHAM,
Their Attorney.

Bill of particulars.

Leverett Saltonstall to Edward T. Russell & Co., Dr.:

For money exacted and paid under protest, as and for customs duties on canned blueberries imported into the port of Boston in excess of the amounts to which the same was by law subject on importation, as follows, to wit:

Item 1. 1887, November 18th. On 12,000 cans in 500 cases..... 81.
" 2. Interest on same ....

7 The writ in this cause is dated the thirteenth day of March, A. D. 1888, and was duly entered at the May term of this court, A. D. 1888, when and where the parties appeared by their respective attorneys.

This cause was thence continued from term to term to this present October term, when the following agreed statement of facts is filed:

Agreed statement of facts (filed Oct. 22, 1889).

It is agreed that the material facts in this case are as follows: The plaintiffs, on the twenty-second day of October, 1887, imported from New Castle, N. B., into the port of Eastport, Me., upon the steamship "Cumberland," running regularly between St. John, N. B., Eastport, and Boston,

five hundred cases of canned blueberries consigned to John Thompson, the master of the steamer, to be by him entered at the custom-house at Eastport, and thence to be immediately transported in bond to the port of Boston, Mass., consigned to the plaintiffs. The goods were duly entered at the custom-house at Eastport by said master of the steamer as agent of the plaintiffs for warehouse and immediate transportation without being removed from the steamer, on the twenty-second day of October, 1887. The duties were assessed by the collector at Eastport on the same day, and the amount of duty fixed at one hundred and forty-four dollars, being twenty per centum of seven hundred and twenty dollars, the value of the blueberries, cases, cans, and cost of packing added together, that being the amount of the entered value. The goods were immediately transported upon the same steamer in bond to Boston and entered by the plaintiffs at the custom-house at Boston for rewarehousing and withdrawal, on the eighteenth day of November, 1887. The cases containing said canned blueberries were made of wood, were five hundred in number, and
8 of the value of thirty dollars. The cans containing said blueberries were made of tin, and each can contained one and a half pounds of blueberries; each case contained twenty-four cans, and each of said cans contained blueberries; the number of cans was twelve thousand, and their value three hundred dollars. Both the cases and cans were the usual and necessary coverings of such goods, and were not of any material or form designed to evade duties thereon, nor designed for use otherwise than in the bona fide transportation of the goods to the United States. The value of the blueberries so imported was $315; the value of the coverings was $330, and the cost of packing them was $75.

Upon examination of the said goods by the United States appraisers in Boston, they reported to the collector at Boston that the dutiable value of the same was $315, being the cost of the blueberries without including the value of the coverings or the cost of packing them, and the plaintiffs were informed by the said collector at Boston that he, the Boston collector, would write to Eastport and call the attention of the Eastport collector to the fact that the value of the coverings had been included by him in the dutiable value. The Boston collector did accordingly write to the Eastport collector, asking that the correction be made, and received the answer that the assessment as made at Eastport was correct, and refusing to correct it. Thereupon the Boston collector reported the case to the Secretary of the Treasury, notified the Eastport collector of the fact, and in the meantime suspended the entry. On the eleventh day of November, 1887, the Secretary of the Treasury instructed the collector at Eastport by letter, a copy of which is to this statement of facts annexed and marked "O."

On the eighteenth day of November, 1887, the plaintiffs, wishing to withdraw the goods in question, the duties were assessed by the collector at Boston, and the assessment of the Boston collector was for the same amount and made up of the same items as the assessment made by the collector at Eastport.

The plaintiffs claimed that the said merchandise was subject by law to the payment as customs duty of twenty per centum of the value of the said blueberries, without including the value of the said cases or
9 cans or the cost of packing them; that is to say, twenty per cent of $315, amounting in the whole to $63, as the appraisers at the

port of Boston had reported to the collector; but the defendant, then collector of customs for said port of Boston, assessed upon said goods a duty of $144, being twenty per centum of $720, the value of the blueberries, cases, cans, and cost of packing added together, that being the amount of the original entered value, a sum exceeding by $81 the amount which the plaintiffs claimed was due and payable as customs duties; and the defendant exacted payment of the same from the plaintiffs, who made payment thereof on said eighteenth day of November, 1887, to the said defendant under protests, copies of which are hereto annexed, and in order to obtain possession of said merchandise.

The plaintiffs being dissatisfied with the decision of the said defendant collector, assessing the said duty upon the said merchandise, gave to him and mailed to the collector at Eastport notice thereof in writing on the said eighteenth day of November, setting forth therein distinctly and specifically the grounds of their objection thereto, and on the said eighteenth day of November appealed to the Secretary of the Treasury, who declined to entertain the appeal on the ground that the protests had not been seasonably filed, but affirmed the said assessment of the said collector at Eastport, and the plaintiffs seasonably brought this suit to recover the said sum of $81 so exacted and paid to said defendant for customs duty upon said merchandise.

The writ and pleadings may be referred to; also annexed copies of protests and copy of invoice, and also the Treasury regulations.

Upon the foregoing facts it is agreed that the court may enter such judgment as the law requires, trial by jury being hereby waived by both parties.

FREDERIC CUNNINGHAM,
Attorney for Plaintiffs.
T. H. TALBOT,
Ass't Attorney for the U. S.

10 *Copy of protest to collector at Boston.*

BOSTON, *Nov.* 18, 1887.

Hon. L. SALTONSTALL,
Collector of Customs, Boston:

SIR: We hereby protest against your liquidation and assessment of duties on five hundred cases blueberries (canned) consigned to us and covered by our "rewarehouse and withdrawal entry for consumption," of Nov. 18, 1887, which said canned blueberries were imported into Eastport, Me., by S. S. "Cumberland" from St. John, N. B., and forwarded in bond to this port, under warehouse and transportation entry bond No. 36, made at the port of Eastport, Me. We claim the correct dutiable value of the goods in question is $315, and the appraisers at this port so reported that value for duties, which value excludes the cost of cans, cases and labor packing, whereas the value determined by your liquidation and assessment includes these non-dutiable items.

We protest against the liquidation as made by you of this entry of blueberries, and against the payment of the duties exacted thereon, upon each and every one of the following grounds:

First. That under the act of March 3, 1883, the cost or market value of said merchandise is alone dutiable; whereas in ascertaining the dutia-

ble value thereof, there has been illegally estimated and included as a part of such value, charges expressly declared by sect. 7 of said act as non-dutiable.

Second. That under the act of March 3, 1883, only the value of said blueberries is dutiable; whereas the value of the usual and necessary cases, cans, boxes and other coverings and labor packing have been estimated as part of the value of said goods, in determining the amount of duties for which they should be liable, contrary to the provisions of sect. 7, act March 3, 1883.

Third. By the act of March 3, 1883, all duties heretofore exacted upon charges incurred in the importation of merchandise are repealed, but there has been included in estimating the dutiable value of said goods, actual, usual, and necessary charges for putting up, preparing and packing said merchandise; and we hereby separately and distinctly protest against all duties assessed by reason of such additions to the actual cost or market value of the actual merchandise imported.

And we give notice that we pay all higher duties or rates than is claimed above as the legal duty, and pay the duties thus liquidated and assessed under protest and compulsion, and in order to obtain and keep possession of our merchandise imported for us.

Respectfully yours,

EDWARD T. RUSSELL & CO.

11 *Copy of protest to collector at Eastport.*

EASTPORT, *Nov.* 18, 1887.

COLLECTOR OF CUSTOMS,
Eastport, Me.:

SIR: I hereby protest against your action in assessing duties on erroneous value of $720 given in warehouse and transportation entry bond No. 36, made by me at your port on the 22d of October last, and covering certain five hundred cases canned blueberries imported by me in the S. S. "Cumberland" from St. John, N. B., on the 22d of October, 1887, and entered as above indicated.

I base my protest upon the ground that the cost of the cases and cans is non-dutiable under tariff act of March 3, 1883, and department rulings thereon under the Oberteuffer decision.

The amount of duty erroneously exacted is $81, being the difference between $144 as exacted on $720 at twenty per cent and $63 at twenty per cent on $315, this latter amount being the correct duty based on the value of $315 of the blueberries.

For the above reason I object to your action, and hold you and the Government responsible for any and all sums of money which have to be paid on account thereof.

Respectfully yours,

JOHN THOMPSON.

Copy of invoice.

[International Steamship Company. Invoice of goods shipped per steamer "Cumberland" for Eastport.]

Consignee.	Goods.	Value.
Edward T. Russell & Co., Boston, Mass.	500 cases canned blueberries in their own juice, 2 doz. 1¼ lb. cans to each box, 18,000 lbs. blueberries, 1¼.	$315.00
	12,000 cans, 2½	300.00
	500 cases, 6	30.00
	Cost of packing	75.00
	Consular authentication	2.50
		$722.50

Consigned to John Thompson, Eastport, Me.
To be bonded at Eastport.
NEW CASTLE, *Oct. 18, 1887.*

U. S. LOGGIE,
Shipper.

NOTE.—Across the face of the invoice was written in red ink the following: "Blueberries dutiable a 20%. J. M. B." "Oct. 24, 1887. Canned berries, 20%. Correct. C. J. C." "Dutiable value, 315. GEO. C. JOSLIN, *Asst. Appr.*"

12 O.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., Nov. 11, 1887.

COLLECTOR OF CUSTOMS,
Eastport, Maine:

SIR: The department is in receipt from the collector at Boston of warehouse and transportation entries (Nos. 34 and 36), covering canned blueberries shipped from your port, an inspection of which indicates that the cost of cans, cases, and packing was not deducted by you from the total invoice value of said merchandise, although said items were plainly stated in the invoice, and shown to have been included in the invoice value.

The collector at Boston has also forwarded your letter, dated the 27th ultimo, addressed to him, in which you state that it has been the custom at your port for the past ten years, in assessing duty on canned blueberries, to assess the same on the total value of the invoice, cans, cases and packing, and all items included, less the consular charge, which you consider to be the true value of the goods; and you also indicate that such appraisement of these goods is in accordance with the instructions and regulations of the department.

By reference to the department's decision of Feb. 2, 1886 (S. 7387), which is recommended for your careful perusal, you will perceive that the Supreme Court of the United States has decided (p. 102) "that if the boxes or coverings of any kind are not of a material or form designed to evade duties thereon, and are designed to be used in the bona fide transportation of the goods to the United States, they are not subject to duty." And, also (p. 104), that "whatever is put down in the invoice and entry as the value of the goods per se, can not be diminished, although in fact there may have been included in such value the cost of cartons and packing, unless the invoice or entry shows distinctly what such cost was, and that it was included."

This decision of the Supreme Court has been the subject of repeated instructions from this department, setting forth for the guidance of the

custom officers the course to be followed with regard to the dutiable character of coverings, packing, etc. [7453 and 7822].

It has also been the subject of interpretation by the Attorney-General of the United States, whose opinions have been promulgated by this department for the instruction of customs officials. See Sept. 21, 1886 (S. 7766), Sept. 29, 1886 (S. 7781) and Oct. 2, 1886 (S. 7791), Dec. 1, 1886 (7886).

In the second of said decisions last named, you will perceive that on cans containing French pease, prepared meats, fish, fruits, vegetables, etc., are held to be free of duty.

13 You will conform the practice at your port to these decisions, and in all cases where either the invoice or entry shows the cost of the cans, cases, and packing, or either of them, and also shows that such value was included in the total invoice value, the cost thereof should be deducted either by the importer or by the appraising officer before the assessment of duty. If, however, such deduction results in leaving an insufficient value for the merchandise, per se, the importers may make an addition on entry sufficient to make the foreign market value of the merchandise, and if they fail to make such addition, or if the addition made by them is insufficient for that purpose, the appraiser should make the requisite addition for the purpose of assessment of duty.

Respectfully yours,

I. H. MEYNARD,
Assistant Secretary.

No. enc'l.

J. G. M.

14 *Judgment.*

This cause thereupon comes on to be heard and is fully heard by the court, and now, to wit, April 12, 1890, it is considered by the court that the said Edward T. Russell and Clarence B. Mitchell, plaintiffs, recover of the said Leverett Saltonstall, defendant, the sum of eighty-six dollars and eighty-three cents ($86.83) damages and their costs of suit taxed at thirty-three dollars and forty-three cents ($33.43).

A true record.

Attest:

JOHN G. STETSON, *Clerk.*

15 Circuit court of the United States, district of Massachusetts.

EDWARD T. RUSSELL ET AL.
v.
LEVERETT SALTONSTALL. } No. 3013, law docket.

Assignment of errors.

Assignment of errors under writ of error sued out from the Supreme Court.

And for assignment of errors the plaintiffs in error say that the facts found in said entitled case are not sufficient in law to sustain the judgment therein rendered.

FRANK D. ALLEN,
U. S. Attorney.

16 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled

EDWARD T. RUSSELL ET AL., PLAINTIFFS,
v.
LEVERETT SALTONSTALL, DEFENDANT,
} No. 3031, law docket,

lately determined in said circuit court, and of all proceedings therein and of the assignment of errors filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN G. STETSON, *Clerk.*

(Indorsed on cover:) No. 314. Leverett Saltonstall, collector of customs for the port of Boston and Charlestown, plaintiff in error, vs. Edward T. Russell and Clarence B. Mitchell, copartners as Edward T. Russell & Company. 14360. Massachusetts C. C. U. S. Filed October 20, 1890.

254——2

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK

Case No. 14360.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

LEVERETT SALTONSTALL, COLLECTOR for the ports of Boston and Charlestown, plaintiff in error,
v.
EDWARD T. RUSSELL ET AL.
No. 314.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

Case No. 14360.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

LEVERETT SALTONSTALL, COLLECTOR for the ports of Boston and Charlestown, plaintiff in error,
v.
EDWARD T. RUSSELL ET AL. } No. 314.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid on goods imported in 1887. It is therefore governed by the tariff act of 1883. No answer seems to have been filed to plaintiff's declaration, but an agreed statement of facts was submitted and judgment thereon directed for the plaintiffs. The case was tried by Judge Colt without a jury.

STATEMENT OF FACTS.

The material portions of the agreed statement of facts are as follows:

> The plaintiffs, on October 22, 1887, imported from Newcastle, New Brunswick, into the port of Eastport, Me.. upon the steamship *Cumberland*, running between St. John (N. B.), Eastport, and Boston, 500 cases of canned blueberries, consigned to John Thompson, the master of the steamer, to be by him entered at the custom-house at Eastport, and thence to be immediately transported in bond to the port of Boston, Mass., and consigned to the plaintiffs. The goods were duly entered at the custom-house at Eastport by said master of the steamer, as agent for the plaintiffs, for warehouse and immediate transportation, without being removed from the steamer, on October 22, 1887. The duties were assessed by the collector at Eastport on the same date, and the amount of the duty fixed at $144. * * * The goods were immediately transported upon the same steamer in bond to Boston and entered by plaintiffs at the custom-house at Boston for rewarehousing and withdrawal on November 18, 1887. * * * On November 18, 1887, the plaintiffs, wishing to withdraw the goods in question, the duties were assessed by the collector at Boston, and the assessment of the Boston collector was for the same amount and made up of the same items as the assessment made by the collector at Eastport. * * * And the defendant exacted payment of the same from the plaintiffs, who made payment thereof on said November 18, 1887, to the said defendant under protests, * * * and in order to obtain possession of said merchandise. The plaintiffs being dissatisfied with the decision of the said defendant collector

assessing the said duty upon the said merchandise, gave to him and mailed to the collector at Eastport notice thereof in writing on said November 18, etc. * * *

It seems to have been conceded that the duties assessed were illegal, being in violation of the principle of *Oberteuffer* v. *Robertson*, 116 U. S., 499.

ASSIGNMENT OF ERROR.

We assign for error the award of judgment to plaintiffs on these facts, claiming that the judgment should have been for defendant on the ground that the protest was too late.

The only question in the case is whether the protest should have been made under §§ 2931 and 3011 of the Revised Statutes within ten days after the liquidation of the duties at Eastport. This question is one of some importance.

ARGUMENT.

I.

The lack of an answer is immaterial, for the reasons stated in the brief for plaintiff in error in *Presson* v. *Russell*, No. 315 of this term.

II.

The general policy of our tariff laws is that imported goods shall be examined and the duties fixed at the first port which the vessel enters in our waters, and that the duties thus fixed shall be then and there paid or secured. If she is in the combined foreign and coasting service, like the boats running from St. John, New Brunswick, to

Eastport, and thence to Portland, Boston, or New York, it is a common practice to enter the goods at the first port for "warehousing and immediate transportation" under Treasury Regulations. The vessel is regarded as a warehouse, as in *Hartranft* v. *Oliver* (125 U. S., 525). At the port of destination the goods are entered for rewarehousing or for consumption.

The practice has grown up out of Rev. St. § 3000. Treasury regulation 721 of 1884 prohibited the transportation of the goods until the dutiable values and duty had been definitely fixed and bond given therefor. The practice seems to be preferred to that of applying to have the goods sealed under Rev. St., §§ 3102–3.

At certain ports, indeed, goods can be imported and shipped through without appraisement under the "Immediate Transportation Acts." (Rev. St., §§ 2990–8; act of June 10, 1880, ch. 190.) Eastport is not one of these ports.

The goods are reexamined at the port of destination, but if errors are found the remedy is by correspondence with the Secretary of the Treasury. "Collectors are not authorized to make a new assessment of duties upon such appraisement." (Treasury regulation 740 of 1884.) The similar practice under the act of 1854 and regulations of 1857 was considered by Mr. Justice Clifford and Judge Lowell in *Spring* v. *Russell* (1 Lowell, 258), and it was held that the entry at the port of importation was complete, and that a new assessment by the collector at the final port was illegal. The transportation in the *Spring* case was by rail, but that affords no legal distinction.

III.

The legal assessment and liquidation of duties in the case at bar was therefore accomplished at Eastport, October 22, 1887.

It was the importers' privilege to protest within ten days thereafter. (Rev. St., §§ 2931, 3011.) Not having done so, their rights were waived. (*Merritt* v. *Cameron*, 137 U. S., 542; *Cadwalader* v. *Partridge*, *id.*, 553.)

IV.

The assessment at Boston having no legal value, its date is irrelevant to the question of timeliness of the protest. The Secretary of the Treasury properly so held. His directions to the Eastport collector as to future liquidations have nothing to do with this case.

It is therefore respectfully submitted that the judgment should be reversed and judgment directed in favor of the defendant.

EDWARD B. WHITNEY,
Assistant Attorney-General.

FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Record Case No. 14,360. Term No. 314.

LEVERETT SALTONSTALL,

COLLECTOR OF CUSTOMS FOR THE PORT OF BOSTON AND CHARLESTOWN,

PLAINTIFF IN ERROR,

v.

EDWARD T. RUSSELL AND CLARENCE B. MITCHELL,

COPARTNERS AS

EDWARD T. RUSSELL & COMPANY,

DEFENDANTS IN ERROR.

BRIEF FOR THE DEFENDANTS IN ERROR.

FREDERIC CUNNINGHAM,

Counsel for the Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM 1893.

Record Case No. 14360. Term No. 314.

LEVERETT SALTONSTALL, *Collector of Customs for the Port of Boston and Charlestown, Plaintiff in Error,*

v.

EDWARD T. RUSSELL AND CLARENCE B. MITCHELL, *Copartners as* EDWARD T. RUSSELL & COMPANY, *Defendants in Error.*

BRIEF FOR THE DEFENDANTS IN ERROR.

I. PROTEST WAS IN TIME.

It will probably not be questioned that the duties in this case were wrongly *assessed*, first, in including the value of the coverings at all in the dutiable value; second, in adding in the value of the coverings *twice* in making up the dutiable value, when their value should not have been included at all.

See

Sect. 7 of Act of Congress March 3, 1883 (22 U. S. Stats. at large, 523).

Oberteuffer *v.* Robertson, 116 U. S. 499.

Letter of Treasury Department appended to Agreed Statement of Facts (page 7) and marked "O."

See also

Report of Boston appraisers on invoice, Statement of Facts, page 7, note in fine print.

But the collector seeks to support the *exaction* of the duties, though wrongfully *assessed*, upon the ground that protest was not made by the importer within the time required by law.

The provisions of law governing protests at the time in question are contained in Sect. 2931 of Rev. Stats. U. S., by which it appears that the decision of the collector at the port of importation and entry is final unless protest is made "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs."

It appears by the Statement of Facts (page 4), that the duties were *first* assessed by the collector at Eastport, on Oct. 22, the goods not having been removed from the steamer, and that they were then immediately brought to Boston, *examined for assessment* at the latter place by the appraisers, who discovered the mistakes made at Eastport, and the matter was referred to Eastport and Washington by the Boston collector; meanwhile the importer wishing to withdraw the goods, the duties were assessed for the second time by the collector at Boston, on Nov. 18, and on the same day protests were made both to the collector at Eastport and the collector at Boston.

Which assessment is referred to by the words "ascertainment and liquidation," contained in Sect. 2931, above referred to?

The defendants in error contend that it is the second or final liquidation or assessment; that the first was only a preliminary, hasty and approximate assessment, for the purpose of determining the amount of the transportation bond to be given.

This will be more apparent when the course of proceedings in cases like this, as set forth in the Treasury Regulations, is considered and the decisions of the Courts upon the construction of Sect. 2931 are examined.

Article 721 of the Treasury Regulations of 1884 (page 291) regulates the withdrawal of merchandise from a warehouse in one collection district for transportation in bond to a warehouse in another collection district, and is the provision under which the parties acted in this case.

The prescribed form of transportion bond is given on page 294 of the above regulations.

Article 740 of the above regulations (page 301) provides that upon arrival at the port of destination the merchandise shall be again subjected to examination and appraisement and the duties estimated and reported to the collector.

Article 743 provides that if any difference in valuation or classification be reported by the appraisers, the case must be reported to the Secretary of the Treasury, the collector of the port of original entry notified, *and the entry in the meantime suspended.*

Are the duties ascertained and liquidated within the meaning of the statute (Rev. Stats. 2931), while the entry remains *suspended* awaiting the decision of the secretary, upon the question which collector is right in his assessment? That question is answered in the negative by the decision of the late Chief Justice Waite, in the Circuit Court for the Southern District of New York, in the case of Watt *v.* U. S., 15 Blatchford, 29, as follows: —

"The appeal to the Secretary of the Treasury, provided for in this statute, to be available for the purposes of a review of the decision of the collector, must be taken after such an 'ascertainment and liquidation' of the duties as would be final and conclusive if no appeal should be taken: the secretary cannot be called upon until after the final disposition of the matter by the collector. He is not required to act upon the rulings of that officer from time to time, as they are made while 'ascertaining and liquidating,' but only after the work of the collector has been fully completed."

(It will be remembered that reference by the collector to the secretary is not the appeal above referred to.)

What is true of an appeal in this respect is true of a protest: the importer is not bound to protest against the rulings of the collector or collectors from time to time, as they are made while ascertaining and liquidating and differing, but only after the decision of the proper officer of the customs has been made and the duties ascertained and liquidated for the last time, in such a sense as that the decision would be final and conclusive, if no appeal should be taken.

How can it be said that such a liquidation had taken place in the case at bar on Oct. 22, when the goods were assessed at Eastport?

See also opinion of attorney general, Vol. 16, page 356, which calls attention to an unreported decision of Judge Shipman upon this question, and evidently favors the conclusion that when the first liquidation is subject to final revision on the part of the collector it is not the "ascertainment and liquidation" referred to in the statute, though no opinion on the subject is given by the attorney general,

owing to the supposed conflict of authority between Judge Shipman and Chief Justice Waite.

See also *Merritt* v. *Cameron*, 137 U. S. 542, which holds that protest made within ten days after withdrawal for consumption is not sufficient, if more than ten days after final liquidation, but which seems to imply that the liquidation referred to in the statute is not the hasty and approximate one made to determine the amount of the bond, but the second and exact one. (See page 550.)

See also, *Robertson* v. *Downing*, 127 U. S. 607, which holds that when after duties have been liquidated a reliquidation takes place, the date of the reliquidation is the final liquidation for the purpose of protest.

See also, *Iselin* v. *Barney*, 5 Blatchford, 185, a case decided under the fifth section of Act of Congress, March 3, 1857 (11 U. S. Stats. at large, 195), which provided that the decision of the collector upon the liability of goods to duty should be conclusive unless protest were made within ten days after *entry*. Judge Nelson, then upon the bench of the Supreme Court of the United States, held that this referred to the entry for *withdrawal*, not the entry for warehouse, and his reasoning has a direct bearing upon the case at bar.

The defendants in error, therefore, submit that the ascertainment and liquidation referred to in the statute as applied to the case at bar was that which occurred at Boston on Nov. 18, 1887; as the importer wished to withdraw the goods, and no instructions had been received from Washington supporting the Boston collector (though it is apparent from the letter of the Treasury Department, marked "O", annexed to the statement of facts, that the department must have supported the Boston collector), he was bound by the Treasury Regulations, Art. 743, to assess the duty for the same amount as it was assessed at Eastport, and when he had so assessed it, it was finally and conclusively fixed as far as the collectors were concerned, and then the importer's remedy by protest and appeal arose. Up to that time the assessment might and would have been changed by the collector upon receipt of orders from the Treasury Department.

After that time no change could be made by the collector, and the

importer was left to his other remedy, protest and appeal; and he resorted to that other remedy at once, by filing his protest on the same day as the final liquidation, Nov. 18, 1887.

The defendants in error submit therefore that their protest was in time. Appeal was taken at the same time, and as that was within thirty days of even the first liquidation at Eastport, there can be no question that the *appeal* was in time; in fact the agreed facts so state. (Page 5.)

II.

Collector had no Jurisdiction. Assessment Void. No Protest Necessary.

The defendants in error further contend, upon the principle laid down in U. S. *v*. Thurber, 28 Fed. Rep. 56, that the collector had no jurisdiction or power to assess a duty upon the coverings: the liquidation was void; just as if the collector undertook to assess a duty upon domestic goods: the appraisement was void; and in such a case Sect. 2931 of the Rev. Stats. does not apply, and no protest is necessary, because there has been *no* valid liquidation.

U. S. v. *Thurber*, 28 Fed. Rep. 56.
Robertson v. *Frank Bros. Co.*, 132 U. S. p. 24.
Badger v. *Cusimano*, 130 U. S. 39.
Oberteuffer v. *Robertson*, 116 U. S. 499.

The judgment should, therefore, be affirmed.

FREDERIC CUNNINGHAM,
Counsel for the Defendants in Error.

Office Supreme Court U. S.
FILED.
MAR 20 1894
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CLERK.

Supreme Court of the United States.

LEVERETT SALTONSTALL, COLLECTOR, etc., plaintiff in error,
v.
EDWARD T. RUSSELL ET AL.
No. 314.

REPLY BRIEF.

Defendants in error, by their brief just filed, raise the point that no protest was necessary, because the collector's act in assessing duty on the tin blueberry cans was an absolute nullity. They cite the *Oberteuffer Case* (116 U. S., 499) and later cases in this court, and *United States* v. *Thurber* (28 Fed. Rep., 56).

The *Oberteuffer Case* contained no such ruling, but Mr. Justice Blatchford's view was quite to the contrary, for he said (p. 516):

> We are of opinion that the first, second, and third paragraphs of the protest in this case are sufficient to raise the points relied on by the plaintiffs, and that to protest was the proper way to raise those points.

The learned judge who delivered the charge in the *Thurber* case seems to have overlooked this part of the *Oberteuffer* opinion. This court has never countenanced any exceptions to the requirement of due protest. In *Robertson* v. *Downing* (127 U. S., 607), the protest under discussion was a protest against the inclusion of unlawful charges. In *Nicholl* v. *United States* (7 Wall., 122), it was against the exaction of duties on gooods not imported. Defendants' present argument would make the whole discussion in those cases gratuitous. On the contrary, speaking of claims that duties were illegally exacted because the goods had not been imported (owing, apparently, to leakage on the voyage), Chief Justice Taney, in *Lawrence* v. *Caswell* (13 How., 488, 496) said:

> When we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made the duties are not illegally exacted in the legal sense of the term.

Defendants in error also endeavor to make out that the action of the Eastport collector was only an estimate and not a liquidation, and thereby to bring this case within certain language of the oft-discussed case of *Watt* v. *United States* (15 Blatchf., 29). It would seem enough to point out that this record declares the duty to have been "fixed"—certainly the same thing as "liquidated"—at Eastport. The treasury regulations referred to were in view of the Government's *right* to *re*-liquidate, recognized in *Iasigi* v. *The Collector* (1 Wall., 375); *Beard* v. *Porter*, (124 U. S., 437), and *Robertson* v. *Downing* (*supra*).

When the Government does not exercise its right, and change the assessment, the importer gets no extension of time to object. The proceedings at Boston on this entry recognize the fact that the real ascertainment of duties was at the port of first importation.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney-General.

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